Supreme Court, U.S.
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Case No.:

In The

Supreme Court of the United States

October Term, 2000

MICHAEL A. SCOTT

Petitioner,

versus

NORFOLK SOUTHERN CORPORATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Petitioner Appearing Pro Se

28 pp

QUESTIONS PRESENTED

I. Whether a federal district court has power under Article III § 2 of the United States Constitution to adjudicate the merits of a claim or cause of action separate and distinct from the federal case or controversy over which it might otherwise have proper jurisdiction? And if the answer to this question is no, then whether the district court erred in dismissing on the merits similar claims or causes of action unrelated to the respondent alleged case or controversy in this case?

II. Whether the court of appeals had jurisdiction to dismiss the appeal for failure to post the appeal bond ordered by the district court with respect to the unrelated claims or causes of action at issue in both cases?

PARTIES TO THE PROCEEDINGS

Plaintiff in the District Court:

Michael A. Scott

Defendants in the District Court:

Norfolk Southern Corporation
Williams Kelly & Greer, P. C.
David R. Goode
Stephen C. Tobias
Donald W. Mayberry
Jon L. Manetta
William E. Honeycutt
C. David Vittur
Donald D. Graab
Artis L. Luttrell
Timothy A. Heilig
Lewis D. Hale
Jerry R. Gray
Wayne F. Henley
Jeff E. Pair
Jerry W. Clemmer
William D. Catron, Jr.
Samuel J. Webster
Heather A. Mullen
David N. Payne
Ernie Price
Elias I. Vega
M. J. Moore
Roger A. Petersen
Mark D. Perreault
Robert C. Scaro

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Civil Rights Act of 1866, 42 U.S.C. § 1981 . . . . . *passim*

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28 U.S.C. § 1367 (a) . . . . . *passim*

Article III, § 2, U. S. Constitution . . . *passim*

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Federal Rule of Appellate Procedure 7, 28 U.S.C. . *passim*

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TO THE HONORABLES, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Michael A. Scott, as *pro se*, respectfully requests that a *writ of certiorari* be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in these cases.

OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit did not issue a written opinion in the two cases it consolidated. The order of dismissal issued by the district court for Case No. 00-1516, CA-99-348-2 ("Scott XI") dismissed on the merits all claims. The order of dismissal issued by the district court for Case No. 00-1576, CA-99-1814-2 ("Scott XIII") dismissed on the merits all claims.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") was entered on August 31, 2000 (App. A). The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing in banc for the consolidated cases on October 2, 2000 (App. B).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS

Petitioner sets out the text of the following statutory provisions:

Supreme Court Rule 10.

Considerations Governing Review on Certiorari. Review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Article III § 2 of the United States Constitution.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Consuls; -- To all Cases of admiralty and maritime Jurisdiction; -- to Controversies

between two or more States; -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Original Jurisdiction Statute 28 U.S.C. § 1331.

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Removal Statute 28 U.S.C. § 1441.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which state law predominates.

Supplemental Jurisdiction 28 U.S.C. § 1367 (a).

(a) Except as provided in subsections (b) and (c) or expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of

additional parties.

Federal Rule of Appellate Procedure 7.

In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal.

STATEMENT OF THE CASES

The petitioner had two cases pending before the Court of Appeals and these cases were consolidated by the Court's order (App. C) issued on August 17, 2000. Both of these cases raised similar questions of federal court jurisdiction. The important fundamental question in these cases is whether the district court had power under Article III, § 2 of the United States Constitution to adjudicate claims or causes of action included in the complaints, totally unrelated to the claim and nucleus of operative fact alleged by the respondents as providing for federal jurisdiction in their removal of these cases from the state courts. The question then arises whether the district court had the power to require an appeal bond under Rule 7 of the Federal Rule of Appellate Procedure after dismissing on the merits the aforementioned unrelated claims included in the same complaint, and whether the Court of Appeals erred in summarily dismissing both cases for failure to post the appeal bond without addressing the jurisdictional questions raised by the petitioner.

These cases involve several important issues regarding the power of a federal court to adjudicate parties, state claims or causes of action that are part of cases removed from a state court. There is also an important consideration raised about whether the removal statute, 28 U.S.C. § 1441 (c), grants a federal district court power to adjudicate not authorized by Article III, § 2. To fully appreciate the significance of the issues presented by these cases, it is essential to consider their procedural background.

A. Background of Scott XI.

This case was filed in the circuit court for the city of Norfolk, Virginia on February 17, 1999. On March 8, 1999, the respondents purportedly, individually and collectively, filed a notice of removal (App. D) removing the case from the state court pursuant to 28 U.S.C. § 1441 (b) and (c). The respondents filed a joint Answer to the complaint (App. E) on March 8, 1999 with the district court, and subsequently filed a motion to dismiss and for summary judgment on March 16, 1999. Thereafter, the petitioner filed a motion to remand and responded to the respondents dispositive motions. The district court denied petitioner's motion to remand and took under advisement respondents' motions to dismiss and for summary judgment. On September 20, 1999, the petitioner moved to dismiss without prejudice. On November 9, 1999, petitioner moved to withdraw his motion to dismiss without prejudice and for the district court to reconsider remanding the case to state court. Subsequently, the district court granted the respondents' motions to dismiss and for summary judgment and denied as moot the petitioner's motion to remand.

Petitioner alleged in his complaint a claim under the Civil Rights Act of 1866, 42 U.S.C. § 1981, that the respondents (excluding defendant Payne) violated his civil rights. The respondents, in their Answer, correctly interpreted the petitioner's complaint as excluding Payne and thus appropriately excluded him in answering the Section 1981 claim allegations. Payne had only state law fraud claims alleged against him which arose in October 1996. The nucleus of operative fact alleged to have given rise to the Section 1981 claim arose nearly two years later in which Payne was not a participant. Furthermore, the remaining state claims included in the complaint were essentially unrelated to the Section 1981 claim and, more importantly, the elements of proof for the state claims are clearly different from and predominate over those required for the Section

1981 claim.

B. Background of Scott XIII.

This case was filed in the circuit court for the city of Virginia Beach, Virginia on October 5, 1999. On October 28, 1999, the respondents purportedly removed this case, individually and collectively, to the district court. On November 8, 1999, the petitioner moved to remand. The complaint (App. F) involved claims sounding entirely in state law. The respondents relied on 28 U.S.C. § 1441 (b) and (c) as their basis for removal presuming that the complaint alleged a separate and independent claim or cause of action over which the district court purportedly had original jurisdiction pursuant to 28 U.S.C. § 1331. On April 7, 2000, the district court, without briefing, argument or hearing from the parties, issued an order of dismissal dismissing *sua sponte* this entire case on the merits with prejudice.

This case involves four separate and distinct state law causes of action, each of which has its own nucleus of operative fact separate and distinct from the other: two Contract claims, Collection claims, and Contempt Hearing claims.

Contract Claims

Petitioner alleged state law contract claims arising out of his employment with Norfolk Southern Corporation ("NS") which ended on February 16, 1996. Thus, the time period and nucleus of operative fact alleged for those claims occurred on and or prior to this date. The respondents, in their notice of removal (App. G), each, individually and jointly, specifically cited the conduct alleged as arising out of the petitioner's employment relationship with NS as their sole basis for giving rise to federal jurisdiction.

Petitioner also alleged state law contract claims arising out of four settlement and release agreements he

entered into in October 1996 with certain of the respondents. The time period and nucleus of operative fact for these claims arose between December 1997 and February 1998.

Collection Claims

The state law claims petitioner alleged regarding the improper efforts of the respondents to collect a district court sanctions judgment have a time period and nucleus of operative fact which arose beginning in mid-1998.

Contempt Hearing Claims

The state law claims petitioner alleged regarding the conduct of the respondents during a contempt proceeding have a time period and nucleus of operative fact which arose in mid-to-late 1999.

The import of the Court of Appeals and the district court's rulings is clear. In taking jurisdiction over parties and claims unrelated to the nucleus of operative fact supporting the federal claim over which the court might arguably otherwise have federal jurisdiction, the court's actions imply that a federal court could adjudicate claims and parties not part of the Article III case or controversy. Such implications by the courts below either ignore or trivialize the limited jurisdiction of federal courts.

REASONS FOR GRANTING THE WRIT

Petitioner notes at the outset that he anticipates the respondents to argue in great detail litigation in which he has engaged in the past before the district court and court of appeals. However, this petition does not necessarily involve a review of the merits of any previous lawsuit, but rather is premised only of federal court jurisdiction.

This petition presents issues of pure Constitutional

law premised on a few important facts relevant to this appeal which are undisputed either because the respondents did not and cannot dispute them, or because the respondents essentially conceded them on the record in the courts below. A significant issue, however, is that the element of proof for the state claims in both cases is far different and predominant, both in fact and in law, than that required for the federal claims alleged by the respondents as providing the basis for their "arising under" jurisdiction in their notices of removal.

As aforementioned, in Scott XI, the respondents clearly acknowledged in their Answer the petitioner's allegation he made in his complaint that defendant Payne was excluded from the Section 1981 claim. The respondents cannot dispute that the fraud claims in Scott XI have a nucleus of operative fact totally unrelated to and in a different time period than the Section 1981 claim. Moreover, the elements of proof for the state law claims in Scott XI would be far different than for the Section 1981 claim thus relying on different factual support, and each defendant was subject to the state law claims.

In Scott XIII, the respondents conceded in the court below that several of them were not and could not be subject to their alleged "arising under" basis for federal jurisdiction. Furthermore, the respondents cannot dispute that most of the state law claims alleged in the Scott XIII complaint have a nucleus of operative fact totally unrelated to and in a different time period from their alleged "arising under" basis for federal jurisdiction, and that each of them is subject to those state claims. Although not all of the respondents were subject to their alleged "arising under" basis for federal jurisdiction as conceded by them in the courts below, the respondents, individually and jointly, alleged in the notice of removal for both cases that each of them was asserting the same "arising under" basis for removal of the case against him or her from the state courts.

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND HAS SANCTIONED A SIMILAR DEPARTURE BY THE DISTRICT COURT SO AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The Court of Appeals, in dismissing these cases, has departed from the accepted and usual course of judicial proceedings and has also sanctioned a similar departure by the district court. The petitioner submits that this Court should exercise its supervisory power to correct such departures. The district court far departed from the accepted and usual course of judicial proceedings when it wrenched these cases from the state courts and proceeded to adjudicate claims and parties to such claims without having power under Article III, § 2 to do so and then imposed an appeal bond in order for the petitioner to appeal its ruling. No federal court has ever found authority under Article III, § 2 to adjudicate claims and parties unrelated to the "nucleus of operative fact" for the federal "case or controversy". It is clear from the actions taken by the district court in dismissing on the merits both cases that it assumed jurisdiction over the state claims on a theory of pendent claim and pendent party jurisdiction, or that jurisdiction over the state claims was vested under the supplemental jurisdiction statute, or simply because each entire case was removed from the state court.

Nevertheless, this Court has made abundantly clear that a federal court's first duty in a case is to determine whether it has jurisdiction to adjudicate the issues presented.

> "This conclusion should come as no surprise, since it is reflected in a long and venerable line

> of our cases. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it. The requirement that jurisdiction be established as a threshold matter spring[s] from the nature and limits of the judicial power of the United States and is inflexible and without exception."

Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 101-102, 118 S.Ct. 1003, 1013, 140 L.Ed.2d 210 (1998) (citations omitted). Without jurisdiction over the unrelated state claims in both cases, the district court was without "power to declare the law" with respect to those state claims, but rather could only order their remand to the state courts. Thus, there was no district court power to require an appeal bond as to those state claims for those claims should have been remanded to the state courts from where they were removed in the first instance. This Court held that Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case. "For a court to pronounce upon [the merits] when it has no jurisdiction to do so," *Steel Co.* declared, "is for a court to act ultra vires." Had the courts below adhered to this rudimentary principle in both cases, they would have found clearly that the courts were without subject matter jurisdiction to "pronounce upon the merits" of the unrelated

state claims requiring their remand back to the state court from where they were removed. The district court did act "ultra vires" when it pronounced upon the merits of the claims totally unrelated to the respondents' alleged "arising under" basis for federal jurisdiction.

As aforementioned, the district court apparently assumed that it had such judicial authority in these cases. It appears that the district court adjudicated these claims and parties simply because they were part and parcel of the same complaint. This Court has clearly cautioned against this approach.

> "But the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct nonfederal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the nonfederal *ground;* in the latter it may not do so upon the nonfederal *cause of action."*

Hurn v. Oursler, 289 U.S. 238, 53 S.Ct. 587, 589 (1933) (emphasis in original); *See* also *Siler v. Louisville & Nashville Railroad Co.,* 213 U.S. 175, 29 S.Ct. 451 (1909); and *Hagans v. Lavine,* 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1973). Quite simply, in both Scott XI and

Scott XIII, separate and distinct sets of "operative facts" surround the state and federal claims. One set of facts in Scott XI is relevant only to the Section 1981 claim, the other only to the state law claims. And in Scott XIII, one set of facts is relevant only to the respondents alleged Title VII (42 U.S.C. § 2000e *et seq.*) and Section 1981 claims interlocked with the alleged state law contract claims, the others only to the remaining state law claims.

In Scott XI, the petitioner acknowledges that the Section 1981 claim would ordinarily give the district court original jurisdiction under Section 1331. In Scott XIII, the respondents raised for the first time in their notice of removal and their Answer that the petitioner's complaint alleged federal causes of action under Section 1981 and Title VII. Assuming *arguendo* that the respondents reliance on Section 1331 for original jurisdiction is plausible at this point, it is of critical importance because, as stated by this Court, "[i]t is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374, 98 S.Ct. 2396, 2403, 57 L.Ed.2d 274 (1978).

The problem with federal jurisdiction in both cases, however, flows from the respondents' reliance on Section 1441 (b) and (c) in both cases and their acknowledgment in their notices of removal that each complaint "sets forth separate and independent claims of a civil nature." *Respondents' Notices of Removal*, ¶ 7 (Scott XI), ¶ 8 (Scott XIII). Removal from state court pursuant to Section 1441 (b) allows federal courts to exercise jurisdiction over pendent state law claims. Thus, removal of the entire case from the state courts would be proper only if the state and federal claims "derive from a common nucleus of operative fact." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). Because the respondents readily acknowledged that petitioner's complaint

"sets forth separate and independent claims of a civil nature" in both cases, those claims cannot also be pendent to their alleged "arising under" federal claims for purposes of Section 1441 (b). In Scott XI, petitioner's state claims and the Section 1981 claim fall far short of deriving "from a common nucleus of operative fact." *Id.* Different parties, dates and elements of proof compel this conclusion. Therefore, the respondents could only have relied on 28 U.S.C. § 1441 (c) as the sole grounds for removal of that case. Scott XIII, however, presents a slightly different picture. Petitioner submits that because the respondents raised the federal issues in Scott XIII predicated on the same factual transactions supporting one of his state law contract claims, there are no "separate and independent claims of a civil nature" from which their alleged Section 1981 and Title VII claims could be distinguished. For the petitioner's state law contract claim is interlocked in the same transactions with the respondents' alleged federal claims for the purposes of Section 1441 (c). Ironically, the Court of Appeals in *Hales v. Winn-Dixie Stores, Inc.*, 500 F.2d 836, 848, n. 12 (4th Cir.), while interpreting the *Gibbs* and *Hurn* standards found "pendent jurisdiction in terms of the claims an individual plaintiff would ordinarily be expected to try in one lawsuit and thereby impliedly rejects any contention that pendent jurisdiction can exist over separate claims of separate plaintiffs." Based on this language of the Court of Appeals, combined with its sanctioning of the district court's jurisdiction to dismiss the "separate claims of separate plaintiffs" and then impose an appeal bond for their appeal in the cases before this Court, implicitly created tension intra-circuit on this important jurisdictional issue.

Petitioner concedes that in Scott XI there may be a separate and independent federal claim, but does not concede such with regard to Scott XIII. The respondents never argued, and in fact could not argue, that the petitioner also has a state law contract claim supported by the same facts that are completely interlocked with their alleged Section

1981 and Title VII federal claims. For this reason, the respondents could not rely on Section 1441 (c) in Scott XIII as a basis for removal. On the other hand, the remaining separate and independent state claims alleged in the Scott XIII complaint prevented the respondents reliance on § 1441 (b) for removal. In *American Fire & Casualty v. Finn*, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951), this Court stated: "where there is a single wrong to a plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim under § 1441 (c)." The respondents reliance on the same facts for their "arising under" jurisdiction assures that they are interlocked with one of the state law contract claims in Scott XIII essentially foreclosing their removal pursuant to § 1441 (c) under *Finn's* one fire rule.

In any event, there is even a more fundamental constitutional reason why removal jurisdiction did not exist under Section 1441 (c). Assuming for the moment that removal of the entire case from each state court was proper under Section 1441 (c), for a federal court to take jurisdiction over the federal cause and the unrelated state cause would raise the question of whether Article III permits adjudication of the unrelated state cause that could find no independent justification for federal subject matter jurisdiction under any of the items listed in Article III, § 2. Plainly stated, the petitioner's state court cases were broader in scope than the cases the district court was permitted to hear under Article III. Accordingly, if Section 1441 (c) is viewed, upon an entirely straightforward reading of its plain language, as authorizing removal of each of petitioner's entire state court cases to the district court, then Section 1441 (c) purports to empower a district court to undertake an unconstitutional act. *See Cedillo v. Valcar Enters. & Darling Delaware Co.*, 773 F.Supp. 932, 935 n. 3 (N.D.Tex. 1991) (noting the "potentially troublesome" constitutional issues raised by Section 1441 (c)); *Moralez v. Meat Cutters Local 539*, 778 F.Supp. 368, 370, n. 2 (E.D.Mich. 1991); *see* also *44A*

Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3724, at 402-03 (2d ed. 1985 ("Yet another problem . . . is whether Section 1441 (c) is constitutional in federal question cases."); and 28 U.S.C. § 1441 *Commentary* at 5. The problem with the district court's exercise of jurisdiction over the unrelated state claims and unrelated parties after their removal pursuant to Section 1441 (c) was that this provision conferred jurisdiction in excess of the limit specifically set forth in Article III, § 2. For it was the supplemental jurisdiction statute, Section 1367, which should have determined whether the district court had jurisdiction to adjudicate the unrelated claims and parties in both cases. And Section 1367 leaves no doubt that the supplemental claims and parties must be "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367.

The import of this Court's decision in *Gibbs, supra,* and *Hurn, supra,* impliedly prohibits a federal court from adjudicating claims and parties whose involvement in the suit is totally unrelated to the purported "case or controversy" providing for federal jurisdiction in a manner consistent with Article III. This bedrock principle is particularly important in the context of removal of a case from state court. The decision whether to remove a case to federal court directly implicates the constitutional distribution of judicial power between federal and state courts. *See Boys Markets, Inc. v. Retail Clerk's Union, Local 770,* 398 U.S. 235, 247, 90 S.Ct. 1583, 1590, 26 L.Ed.2d 199 (1970) ("[T]here is no indication that Congress intended by the removal mechanism to effect a wholesale dislocation in the allocation of judicial business between the state and federal courts."). To the extent that the district court adjudicated the separate claims in both cases not sharing a "common nucleus of operative fact" with the alleged federal claim, such adjudication exceeded the district court's Article III power and, thus, was unconstitutional. Those unrelated claims and parties should have been remanded back

to the state court from where they were removed without reaching the merits and prior to their dismissal with prejudice. *Finley v. United States*, 490 U.S. 545, 547-48, 109 S.Ct. 2003, 2006, 104 L.Ed.2d 593 (1989) (noting that a federal court cannot exercise jurisdiction absent both constitutional and statutory authorization).

II.

THE PETITION SHOULD BE GRANTED BECAUSE AN IMPORTANT QUESTION OF FEDERAL COURT JURISDICTION SHOULD BE SETTLED BY THIS COURT, AND BECAUSE THE DISMISSAL OF THESE CASES BY THE COURT OF APPEALS IMPLICITLY AND EXPLICITLY CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

This Court is once again confronted with a "subtle and complex question with far-reaching implications," *Aldinger v. Howard*, 427 U.S. 1, 96 S.Ct. 2413, 2415, 49 L.ed.2d 276 (1976), regarding whether a federal district court could exercise jurisdiction over a claim or cause of action for which no independent basis for federal jurisdiction exists. This case narrowly presents statutory jurisdictional considerations unlike any directly addressed by this Court. However, there are related decisions by this Court which are instructive and support the petitioner's contention that the district court was without power under Article III, § 2 to adjudicate the aforementioned claims.

In *Aldinger*, *supra*, this Court expressly rejected the addition of a new pendent party, otherwise without any federal jurisdictional basis, to the lawsuit despite that the party's state claims shared a "common nucleus of operative fact" with the federal claims in the case. In *Finley*, *supra*, this Court expressly rejected the addition of claims to the lawsuit, otherwise without any federal jurisdictional basis. Petitioner

readily acknowledges that Congress, in amending Section 1367, may have overruled a portion of this Court's decision in *Aldinger* and *Finley*. Nevertheless, the principle enunciated in both cases and in *Gibbs* is instructive and lends credence to the petitioner's assertion that Article III truly does prohibit federal jurisdiction over claims that do not share a "common nucleus of operative fact" with the federal case or controversy. As the *Aldinger* Court stated, "[b]efore it can be concluded that such jurisdiction exists, a federal court must satisfy not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence." *Aldinger, supra*, 96 S.Ct. at 2422. Congress did, expressly and by implication, negate the existence of supplemental jurisdiction over parties and claims totally unrelated to the core federal issue by stating: "the district courts shall have supplemental jurisdiction over all other claims *that are so related to claims in the action within such original jurisdiction that they form part of the same controversy under Article III of the United States Constitution."* 28 U.S.C. § 1367 (a) (emphasis added). A plain reading of the supplemental jurisdiction statute leaves no doubt that claims which are not "so related to the claims" providing for federal jurisdiction are clearly beyond the statutory reach of supplemental jurisdiction which, by the way, is quite consistent with *Hurn, supra*, and *Gibbs, supra*. *See* also *Pacific Railroad Removal Cases*, 115 U.S. 1, 5 S.Ct. 1113, 29 L.Ed. 319 (1885) (A condemnation action was brought against a number of land owners. One defendant, a federal corporation, removed its controversy because it presented a federal question. And the Court held that the controversy as to the removing defendant was a "suit" itself, distinct and separate from the others, and the other defendants were left in the state court). Since the respondents were intent on removing Scott XI and Scott XIII to the district court, at best there could only have been bifurcation of both cases between the federal court on their alleged federal issues and the state courts on the state law

claims that were beyond the jurisdiction of the district court.

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS IN TAKING JURISDICTION TO DISMISS THE CASE DID SO IN A WAY THAT IMPLICITLY AND EXPLICITLY CONFLICTS WITH THE OPINIONS OF OTHER COURTS OF APPEALS.

The petitioner has already provided plenary reasons why the courts below erred. In Scott XI, there could be no reliance on 28 U.S.C. § 1441 (b) because the state law claims were "separate and independent" as alleged by the respondents in their notice of removal. In Scott XIII, while there was a pendent state law contract claim to the respondents' alleged Title VII and Section 1981 claims, the remaining state law claims were "separate and independent". Reliance on 28 U.S.C. § 1441 (b) for removal jurisdiction actually conflicts with reliance on 28 U.S.C. § 1441 (c) as removal jurisdiction should be "or" and not "and" as alleged by the respondents in their notices of removal. In any event, assuming removal of both cases could be had, such removal could be had pursuant to 28 U.S.C. § 1441 (c). To the extent that the courts below allowed adjudication of the unrelated state claims after their removal under 28 U.S.C. § 1441 (c), the adjudication was unconstitutional and in direct conflict with the conclusions of other courts of appeal on the same important point of law.

> All jurisdictional difficulties, occasioned by the removal of the entire action, are dissolved in the federal court by its power to dismiss or remand all non-removable issues or controversies as justice requires. ***It has no power to adjudicate such separate and***

> ***independent claims or issues not arising from the same transaction or from an interlocked series of transactions.***
>
> A literal construction of Section 1441 (c) of Title 28 of the United States Code might render a part of the paragraph unconstitutional. While it provides for the removal of the entire case, and that the federal court may determine all issues therein, it contemplates the dismissal or remand for want of jurisdiction of all non-removal issues and controversies which constitute separate and independent claims or causes of action not arising out of the same transaction or from a related series of transactions.

Finn v. American Fire & Casualty Co., 207 F.2d 113, 116 (5th Cir. 1953) (emphasis added). *See* also *Tillman v. Russo Asiatic Bank*, 51 F.2d 1023 (2nd Cir. 1931); *Hoffman v. Lynch*, 23 F.2d 518; *Henry v. Independent American Sav. Ass'n.*, 857 F.2d 995, 999 (5th Cir. 1988).

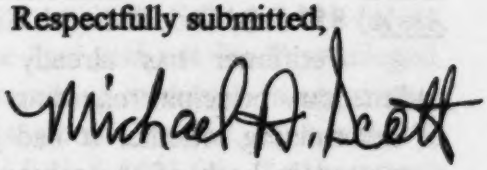
Petitioner has already stated above this Court's rudimentary principle regarding the district court's first duty of determining whether it had jurisdiction over the causes presented in both of the removed cases, particularly in the face of petitioner's vehement challenge to such jurisdiction. This principle faithfully adhered to by the courts below could only have led to the remand of the unrelated state claims to the state courts from where they were removed. The issue of the appeal bond should never have included dismissal on the merits of the unrelated claims for the foregoing reasons. The posture of both cases required, at a minimum, their bifurcated litigation in both federal court and state court, or a complete remand of each case, as a matter of law.

CONCLUSION

The petitioner has set forth three substantial reasons for this Court under its Rule 10 to grant his writ of *certiorari.* This case presents a question of exceptional importance -- whether a district court has power under Article III, § 2 to adjudicate claims separate and distinct from the claim over which it might otherwise have power to adjudicate. If the opinion below is allowed to stand, the Court of Appeals and district court will have unconstitutionally expanded the power of a federal court in a manner inconsistent with Article III, § 2, the opinions of this Court, and the opinions of other courts of appeal. And further, the opinions will have thwarted the settled principle articulated by this Court in a venerable line of cases that federal courts are courts of limited jurisdiction. *Owen Equip. & Erection Co. v. Kroger, supra.*

Accordingly, the petitioner, Michael A. Scott, respectfully requests that his petition for *writ of certiorari* be granted.

Respectfully submitted,



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